

No. 12011

United States
Court of Appeals

for the Ninth Circuit

ESTATE OF JOHN E. BURRELL, Deceased,
ARLEY M. BURRELL, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Upon Petition to Review a Decision of The Tax Court
of the United States

FILED

SEP 23 1948

PAUL P. O'BRIEN,

No. 12011

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Petitioner:

F. T. RITTER, Esq.

For Respondent:

A. J. HURLEY, Esq.

Docket No. 11886

ESTATE OF JOHN E. BURRELL, Deceased,
ARLEY M. BURRELL, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1946

Aug. 26—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 26—Copy of petition served on General Counsel.

Aug. 26—Request for hearing at Los Angeles, California, filed by taxpayer. 8/30/46 Granted.

Oct. 16—Answer filed by General Counsel.

Oct. 24—Copy of answer served on taxpayer—Los Angeles, California.

1947

Sept. 30—Hearing set December 1, 1947—Los Angeles.

Dec. 8—Hearing had before Judge Disney on merits. Stipulation of facts filed. Briefs due 1/15/48. Replies 2/10/48.

1948

Jan. 12—Brief filed by General Counsel.

Jan. 12—Brief filed by taxpayer. 1/13/48 Copy served.

Feb. 9—Reply brief filed by taxpayer. Copy served.

Apr. 6—Memorandum findings of fact and opinion rendered. Judge Disney. Decision will be entered for the respondent. 4/7/48 Copy served.

Apr. 7—Decision entered. Judge Disney. Div. 4.

July 6—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

July 8—Proof of service filed.

July 12—Praecipe for record filed by taxpayer.

July 22—Praecipe for record filed by taxpayer with proof of service thereon. No counter praecipe will be filed. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

The Tax Court of the United States

Docket No. 11886

ESTATE OF JOHN E. BURRELL, Deceased,
ARLEY M. BURRELL, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue, in his notice of deficiency (Bureau symbols LA:ET:90D:NAB) dated May 29, 1946, and as a basis for her proceeding alleges as follows:

1. The petitioner is the duly appointed executrix of the estate of her deceased husband, John E. Burrell, with residence at 715 East Marshall Place, Long Beach, California (certified copy of letters testamentary attached). The return for the estate here involved was filed with the collector for the 6th District of California.

2. The notice of deficiency (copy of which is attached and marked Exhibit "A") was mailed to the petitioner on May 29, 1946. [2]

3. The taxes in controversy are estate taxes assessed July 28, 1943. The deficiency asserted is \$2,199.80, all of which is in controversy.

4. The determination of tax set forth in said deficiency is based upon the following errors:

(a) In determining the decedent's interest in jointly owned property to be \$110,147.87, as per Schedule 1 of Exhibit "B" annexed hereto, the Commissioner erroneously excluded as deductions from jointly owned property, claims which had matured and were owing at the time of decedent's death in the sum of \$10,344.12 for unpaid income taxes of decedent's wife, who was also co-joint tenant in the jointly owned property of decedent. The petitioner contends that decedent's interest in jointly owned property, and as a result, his entire estate is thereby made \$10,344.12 larger in death than in life.

(b) The Commissioner erred in Not determining the gross value of the estate of the decedent to consist of the following items aggregating in value \$123,791.48:

Stocks and bonds	\$	60.00
Insurance		6,827.45
Jointly owned property.....		99,803.75
Other miscellaneous property		17,100.48
		<hr/>
		\$123,791.48

(c) The Commissioner erred in excluding deductions for debts of decedent in the sum of \$1,891.13 as being in excess of the value of property in the decedent's estate subject to claims.

(d) The Commissioner erred in Not determining decedent's net estate for "Basic Tax" to be \$4,739.87.

(e) The Commissioner erred in Not determining

decedent's net estate for "Additional Tax" to be \$44,739.87.

5. The facts upon which the petitioner relies as a basis for this proceeding are as follows:

(a) The decedent died July 28, 1943 in Long Beach, California.

(b) The decedent, John E. Burrell and his wife, Arley M. Burrell, were married October 28, 1907 and had resided in the State of California for approximately thirty years prior to decedent's death.

(c) The decedent was engaged in the general contracting business throughout his married life.

(d) The decedent and his wife accumulated an estate of approximately \$113,447.36 during decedent's lifetime.

(e) The decedent's income during his lifetime and residence in California was community income.

(f) The decedent and his wife, Arley M. Burrell, had for many years held their properties in joint tenancy and with the exception of decedent's interest in the contracting business and his automobile, aggregating in value \$17,160.48, all their estate was held in joint tenancy at the time of decedent's death.

(g) The decedent, John E. Burrell, and his wife, Arley M. Burrell, had filed separate income tax returns with the federal government and the State of California on their community income for the year 1942, and the liability for the calendar year 1942 on each of such returns was respectively, \$18,245.06 and \$1,583.37 for each spouse.

(h) The primary source of community income to

decedent and his wife during decedent's life was the earnings of decedent in the contracting business.

(i) There had been assessed and were still due the following amounts of income taxes at the date of decedent's death:

California income taxes—year 1942

Husband	\$1,055.58
Wife	1,055.58

Federal income taxes—year 1942

Husband	\$9,122.54	
Wife	9,122.54	[5]

Federal income taxes—year 1941

Husband	\$166.00
Wife	166.00

(j) The decedent's wife, Arley M. Burrell, did not have a separate estate during the life of her deceased husband, John E. Burrell. Her entire estate consisted of her rights and interest in the joint tenancy property and community property of hers and the decedent's.

(k) The earnings upon which the income tax obligations of Arley M. Burrell were matured at the date of decedent's death are included in the jointly owned property of the estate of John E. Burrell, deceased, as determined by the Commissioner in the decedent's estate tax return.

Wherefore the petitioner prays that this Court may hear the proceeding and determine That

(a) the claims for unpaid income taxes in the sum of \$10,344.12 against decedent's wife and co-

joint tenant at the time of his death have priority over the interest of the decedent in the jointly owned property, and that the decedent's interest in jointly owned property is therefore subordinate to such claims under Section 811(e) of the Internal Revenue Code.

(b) in the alternative, that the unpaid income taxes of decedent's wife at the time of his death are proper deductions [6] against the estate in its entirety under Section 812(b) of the Internal Revenue Code, And

Order refund and abatement accordingly.

Respectfully submitted,

/s/ F. T. RITTER,

Counsel for Petitioner. [7]

I, Arley M. Burrell, hereby make oath that I am the duly appointed and acting Executrix of the Estate of John E. Burrell, deceased, and that I have read the foregoing petition and that the facts therein stated are true.

/s/ ARLEY M. BURRELL,

Executrix.

Subscribed and sworn to before me this 20th day of August, 1946.

/s/ HAZEL ROBERTS,

Notary Public. [8]

In the Superior Court of the State of California
in and for the County of Orange

No. A-11111

In the Matter of the Estate of John E. Burrell, Sr.,
also known as John E. Burrell, also known as
J. E. Burrell, Deceased.

LETTERS TESTAMENTARY

State of California,
County of Orange—ss.

The Last Will Of
deceased, having been proved in the Superior Court
of the County of Orange, Arley M. Burrell, who is
named therein as such, is hereby appointed Execu-
trix.

Witness, B. J. Smith, Clerk of the Superior Court
of the County of Orange, with the seal of the Court
affixed, the 3rd day of September, 1943.

By order of the Court.

(Superior Court Seal)

B. J. SMITH,
County Clerk.

By E. R. KOLBE,
Deputy.

State of California,
County of Orange—ss.

I do solemnly swear that I will support the Con-
stitution of the United States, and the Constitution
of the State of California, and that I will faithfully
perform, according to the law, the duties of the

office of Executrix of the Last Will of the above named decedent.

ARLEY M. BURRELL.

Subscribed and sworn to before me, this 3rd day of September, 1943.

B. J. SMITH,

County Clerk and ex-officio

Clerk of the Superior Court.

By E. R. KOLBE,

Deputy.

(Notarial Seal)

(Superior Court Seal)

State of California,
County of Orange—ss.

I, B. J. Smith, County Clerk and ex-officio Clerk of the Superior Court within and for the County and State aforesaid, do hereby certify the foregoing to be a full, true and correct copy of the original Letters Testamentary granted herein, as the same appears on file in my office.

I further certify that said Letters have been revoked and are in full force and effect at the present time, and entitled to full faith and credit.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court, this 15th day of August, 1946.

(Seal)

B. J. SMITH,

County Clerk.

By /s/ H. M. HEAD,

Deputy.

[Endorsed]: Filed Sept. 3, 1943. B. J. Smith, County Clerk. By K. Deputy.

EXHIBIT "A"

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Office of
Internal Revenue Agent in Charge,
Los Angeles Division.
LA:ET:90D:NAB

May 29, 1946

Estate of John E. Burrell, deceased
Arley M. Burrell, Executrix
715 East Marshall Place
Long Beach, California

Dear Mrs. Burrell:

You are advised that the determination of the estate tax liability of the above-named estate discloses a deficiency of \$2,199.80, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are

requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,
Commissioner.

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent in Charge.

NAB:vac Enclosures: Statement, Form of waiver.

Statement

	Liability	Assessed	Deficiency
Estate tax	\$8,607.98	\$6,408.18	\$2,199.80

In making this determination of the federal estate tax liability of the above named estate, careful consideration has been given to the report of examination dated March 29, 1945, to the protest dated May 16, 1945, and to the statements made at the hearings on July 30, 1945, and March 22, 1946.

A copy of this letter and statement has been mailed to your representative, Mr. F. T. Ritter, 605 Jergins Trust Building, Long Beach 2, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustments to Net Estate

Net estate for basic tax as disclosed by the return.....	\$	7,585.75
Additions to value of net estate and decreases in deductions:		
Deductions	\$	12,950.06
		<u>12,950.06</u>
	\$	20,535.81
Reductions in value of net estate and increases in deductions:		
Insurance	\$	481.68
Jointly owned property.....		3,079.01
		<u>3,560.69</u>
Net estate for basic tax as adjusted.....	\$	16,975.12
Net estate for additional tax as adjusted.....	\$	56,975.12

Explanation of Adjustments

Insurance:	Returned	Determined
Item 1	\$ 5,000.00	\$ 4,518.32
Difference		\$ 481.68
Jointly owned property:		
Item 1	\$ 12,500.00	\$ 8,500.00
Item 4	7,425.00	7,400.00
Item 4, accrued dividend	0.00	140.00
Item 5, accrued dividend	0.00	100.00
Item 6	2,700.00	2,917.50
Item 6, accrued dividend	0.00	39.87
Item 8, accrued dividend	0.00	160.00
Item 10	2,872.50	2,891.25
Item 10, accrued dividend	0.00	26.12
Item 11	3,900.00	3,950.00
Item 11, accrued dividend	0.00	22.50
Item 14, accrued dividend	0.00	50.00
Item 15, accrued interest	0.00	97.50
Item 16, accrued interest	0.00	23.75
Totals	\$ 29,397.50	\$ 26,318.49
Difference		\$ 3,079.01

Item 1 (the home place) is corrected to a gross value of \$16,000.00 at date of death, less a trust deed encumbrance in the amount of \$7,500.00, which latter was not claimed elsewhere in the return.

Items 4, 6, 10, and 11 are corrected to the mean between high and low sales, or bid and asked price,

on the date of death. Dividends and interest on the other items accrued at date of death as shown above, and were received thereafter.

Deductions:

Total	\$ 30,110.54	\$ 17,160.48
Difference		\$ 12,950.06

Total deductions from gross estate as provided in section 812(b) of the Internal Revenue Code have been reduced from \$30,110.54 to \$17,160.48 as follows:

(a) The amount of \$714.81 claimed on Schedule J for executor's commissions has been disallowed since payment was [12] waived by the executrix.

(b) The following items claimed in Schedule K do not constitute allowable deductions from gross estate:

1941 Federal income tax—Arley M. Burrell.....	\$	166.00
1942 California income tax—Arley M. Burrell		1,055.58
*1942 Federal income tax—Arley M. Burrell.....		9,122.54
Total.....	\$	10,344.12

* This item represents the last two quarterly installments for 1942 which were discharged as of September 1, 1943, under section 6 of the Current Tax Payment Act of 1943.

(c) The remaining deductions have been reduced by \$1,891.13 representing the amount by which such deductions exceed the value, at date of death, of property subject to claims.

Computation of Estate Tax

	Returned	Determined	
Gross estate for basic tax.....	\$137,696.29	\$134,135.60	
Deductions.....	130,110.54	117,160.48	
Net estate for basic tax.....	\$ 7,585.75	\$ 16,975.12	
Net estate for additional tax	\$ 47,585.75	\$ 56,975.12	
Gross basic tax.....		\$ 169.75	
Credit for estate and inheritance tax		135.80	
Net basic tax.....			\$ 33.95
Total gross taxes (basic and additional)		\$ 8,743.78	
Gross basic tax.....		169.75	
Net additional tax.....			8,574.03
Total net basic and additional taxes.....			\$8,607.98
Total tax payable.....			\$8,607.98
Estate tax assessed:			
Original October 1944 list, page 102, line 4.....			6,408.18
Deficiency			\$2,199.80

EXHIBIT "B"

Form 1210

Treasury Department
Internal Revenue Service
417 S. Hill Street
Los Angeles 13, California

Office of Internal Revenue Agent in Charge
Los Angeles Division
LA:ET:30D

Estate of John E. Burrell, Deceased
Arley M. Burrell, Executrix
715 E. Marshal Place,
Long Beach, California

Dear Mrs. Burrell:

Enclosed is a copy of the report of examination of the estate tax return of the above-named estate.

After consideration by this office, the adjustment of the tax liability shown therein appears to be warranted.

If You Agree to the adjustment shown in the accompanying report, the enclosed form of waiver should be executed and forwarded to this office promptly, in order to permit the early assessment of the deficiency in tax and to stop the accumulation of interest. Such interest will cease 30 days after the receipt of the executed form, or upon the payment of the deficiency in tax to the collector, whichever occurs first.

If you desire to make immediate payment of the deficiency in tax without awaiting assessment, you should forward your remittance to the Collector of Internal Revenue at Los Angeles 12, California, enclosing this letter, or a copy thereof. Interest on the deficiency in tax should be included in your remittance, computed at the rate of 6 percent per annum from the due date of the tax to the date of payment.

If You Do Not Agree to the proposed adjustment, you may file a protest, executed in triplicate under oath, with this office, within 30 days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration and, if you so request, an opportunity for a hearing in this office will be granted you prior to final determination of any deficiency against the estate. This letter is not a final notice of deficiency, and this office will be pleased to answer any questions which may occur to you in your examination of the enclosed copy of the report.

Should you fail to pay the deficiency in tax to the collector of internal revenue or to file with this office within the 30-day period mentioned either a waiver on the enclosed form or a written protest, final determination of the tax liability of the estate will be made and a notice of deficiency will be sent you in accordance with the provisions of law applicable to the assessment and collection of estate tax deficiencies.

Your prompt acknowledgment of the receipt of this letter and related papers upon the enclosed form will be much appreciated.

Respectfully,

/s/ GEORGE D. MARTIN,

Internal Revenue Agent in Charge.

Enclosures: Report of examination. Form of waiver 890. Form of acknowledgment. [15]

Examining officer Milton McGrew. Date of report—3/29/45.

Preliminary Statement

Statement of Tax Liability

	Tax previously assessed	Adjustments in this report		Correct tax Liability
		Deficiency	Overassessment	
Estate tax	\$6,408.18	\$2,199.80		\$8,607.98

The deficiency here results principally from the limitations of deductions to the value of property subject to claims. [16]

Form 4-AG

Form 1272

Schedule 1

Line Adjustments—Estate Tax

	Return	Additions to value of estate	Deductions from value of estate	Corrected
A. Real estate	.....	.....	.....	.....
B. Stocks and bonds	\$ 60.00	.....	.....	\$ 60.00
C. Mortgages, notes and cash	.....	.....	.....	.....
D. Insurance	7,308.93	.....	481.68	6,827.25
E. Jointly owned property	113,226.88	.....	3,079.01	110,147.87
F. Other miscellane- ous property	17,100.48	.....	.....	17,100.48
G. Transfers	.....	.....	.....	.....
H. Powers of ap- pointment	.....	.....	.....	.....
I. Property previ- ously taxed	.....	.....	.....	.....
Total Gross Estate	137,696.29	.....	3,560.69	134,135.60
J-1. Funeral ex- penses	1,366.09	.....	.....	1,366.09
J-2. Executors' com- missions	714.81	714.81	.....	0.00
J-3. Attorneys' fees	714.81	.....	.....	714.81
J-4. Misc. administra- tion expenses	441.58	.....	.....	441.58
K. Debts of decedent	23,273.25	.....	.....	23,273.25
L. Mortgages and liens	.....	.....	.....	.....
M-1. Net losses during administration	.....	.....	.....	.....
M-2. Support of dependents	3,600.00	.....	.....	3,600.00
Limitation on De- ductions	.....	12,235.25	.....	(12,235.25)
Total above Deductions	30,110.54	12,950.06	.....	17,160.58
For Basic Tax				
Specific exemption	100,000.00	.....	.....	100,000.00
Deduction for prop- erty previously taxed	0.00	.....	.....	0.00
Total deductions	130,110.54	12,950.06	.....	117,160.48

	Return	Additions to value of estate	Deductions from value of estate	Corrected
For Additional Tax				
Specific exemption	60,000.00	.....	.....	60,000.00
Deduction for prop- erty previously taxed	0.00	.....	.....	0.00
Total Deductions	90,110.54	12,950.06	.....	77,160.48
Net Estate	\$47,585.75	12,950.06	3,560.69	\$56,975.12

Schedule 1-A

Explanation of Changes in Gross Estate

D—Insurance:	Returned	Corrected
Item 1	\$ 5,000.00	\$ 4,518.32
Difference.....		\$ 481.68

Corrected to the amount of proceeds per insurer's statement.

E—Jointly Owned Property	Returned	Corrected
Item 1	\$12,500.00	\$ 8,500.00
Item 4	7,425.00	7,400.00
Item 4, accrued dividend	0.00	140.00
Item 4, accrued dividend	0.00	100.00
Item 6	2,700.00	2,917.50
Item 6, accrued dividend	0.00	39.87
Item 8, accrued dividend	0.00	160.00
Item 10	2,872.50	2,891.25
Item 10, accrued dividend	0.00	26.12
Item 11	3,900.00	3,950.00
Item 11, accrued dividend	0.00	22.50
Item 14, accrued dividend	0.00	50.00
Item 15, accrued interest	0.00	97.50
Item 16, accrued interest	0.00	23.75
Totals	\$29,397.50	\$26,318.49
Difference		\$ 3,079.01

Item 1 (the home place) is corrected to a gross value of \$16,000.00 at date of death, less a trust deed encumbrance in the amount of \$7,500.00, which latter was not claimed elsewhere in the return.

Items 4, 6, 10 and 11 are corrected to the mean between high and low sales, or bid and asked prices, on the date of death. Dividends and interest on the other items accrued at date of death as shown above, and were received thereafter.

Schedule 1-B

Explanation of Changes in Deductions

J-2 Executrix' commissions	\$ 714.81	\$ 0.00
Total other deductions.....	29,395.73	29,395.73
	<hr/>	<hr/>
Total deductions	\$ 30,110.54	\$ 29,395.73
Less, property subject to claims.....		17,160.48

Excess deductions disallowed..... \$ 12,235.25
 Executrix' commissions have been waived and are disallowed.

Section 812(b) of the Internal Revenue Code, as amended by section 405 of the Revenue Act of 1942, limits the total deductions to the value of property subject to claims. The value of property subject to claims was as follows:

Schedules B, \$60.00; F, \$17,100.48. Total, \$17,160.48. [19]

Form 1273

Schedule 2

Computation of Estate Tax

	Return	Corrected
	<hr/>	<hr/>
Net estate (for basic tax)	\$7,585.75	\$16,975.12
Net estate (for additional tax)	47,585.75	56,975.12
	<hr/>	<hr/>
1. Gross basic tax	75.86	169.75
2. Credit for gift tax	0.00	0.00
	<hr/>	<hr/>
3. Gross basic tax less gift tax credit	75.86	169.75
4. Credit for estate and inheritance taxes	60.69	135.80
	<hr/>	<hr/>
5. Net Basic Tax	\$ 15.17	\$ 33.95
	<hr/>	<hr/>

	Return	Corrected
6. Total gross taxes (basic and additional)	6,468.87	8,743.78
7. Gross basic tax	75.86	169.75
	<hr/>	<hr/>
8. Gross add. tax	6,393.01	8,574.03
9. Credit for gift tax	0.00	0.00
	<hr/>	<hr/>
10. Net Additional Tax	\$6,393.01	\$8,574.03
	<hr/>	<hr/>
11. Total net basic and additional taxes	\$6,408.18	\$8,607.98
12. Defense tax (10 percent of item 11)	0.00	0.00
	<hr/>	<hr/>
13. Total Tax Payable	\$6,408.18	\$8,607.98
Total tax assessed		6,408.18
		<hr/>
Deficiency		\$2,199.80

[Endorsed]: Filed Aug. 26, 1946. [20]

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are estate taxes. Denies the remainder of the allegations contained in paragraph 3 of the petition.

4(a) to (e), inclusive. Denies the allegations of

error contained in subparagraphs (a) to (e), inclusive, of paragraph 4 of the petition. [21]

5(a). Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

5(b). Admits that the decedent, John E. Burrell, and Arley M. Burrell were husband and wife on July 28, 1943. For lack of sufficient information as to the truth or correctness thereof, denies the remaining allegations contained in subparagraph (b) of paragraph 5 of the petition.

5(c). For lack of sufficient information as to the truth or correctness thereof, denies the allegations contained in subparagraph (c) of paragraph 5 of the petition.

5(d). Denies the allegations contained in subparagraph (d) of paragraph 5 of the petition.

5(e). For lack of sufficient information as to the truth or correctness thereof, denies the allegations contained in subparagraph (e) of paragraph 5 of the petition.

5(f). Admits the allegations contained in subparagraph (f) of paragraph 5 of the petition.

5(g) and (h). For lack of sufficient information as to the truth or correctness thereof, denies the allegations contained in subparagraphs (g) and (h) of paragraph 5 of the petition.

5(i), (j), and (k). Denies the allegations contained in subparagraphs (i), (j), and (k) of paragraph 5 of the petition. [22]

6. Denies each and every allegation contained in

the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL, ECC
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,
A. J. HURLEY,
Special Attorneys, Bureau of
Internal Revenue.

[Endorsed]: Filed Oct. 16, 1946. [23]

The Tax Court of the United States

Estate of John E. Burrell, Deceased, Arley M. Burrell, Executrix, Petitioner, vs. Commissioner of Internal Revenue, Respondent.

Docket No. 11886

F. T. Ritter, C.P.A., for the petitioner.

A. J. Hurley, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND
OPINION

Disney, Judge: This case involves estate tax. A deficiency was determined in the amount of \$2,199.80,

all of which is in controversy. The question presented is whether the Commissioner erred in disallowing a deduction of \$10,344.12 from the decedent's gross estate. The major portion of the facts was stipulated. The stipulation is adopted by reference and the facts therein set forth will, so far as necessary to an examination of the issue, be included with facts found from evidence adduced in our [24]

FINDINGS OF FACT

The petitioner is the Estate of John E. Burrell, deceased, who died July 28, 1943 a resident of California. Arley M. Burrell is the duly appointed executrix. The estate tax return was filed with the collector of internal revenue for the sixth district of California.

The decedent, John E. Burrell, and Arley M. Burrell were husband and wife, and they resided in the State of California as husband and wife for thirty years prior to decedent's death.

The decedent was engaged in the general contracting business throughout his married life, and his income therefrom was community income. All the properties in the estate of decedent and his widow were derived from the earnings of decedent during their marriage.

Decedent and his wife, Arley M. Burrell, converted their property into joint tenancy during their marriage, except the portion of their property used in decedent's business. Decedent's gross estate

was returned for estate tax purposes as follows (after audit):

Stock and bonds.....	\$	60.00
Insurance		6,827.25
Jointly-owned property		110,147.87
Other property (property used in decedent's business)		17,100.48
		\$134,135.60

The foregoing list of property constituted all the property accumulated by decedent and his wife during their married life. [25]

The total deductions claimed on the return amounted to \$29,395.73 (after audit), and included in addition to debts, funeral and administrative expenses, Federal and state income taxes assessed prior to the death of decedent, as follows:

	Federal Income Taxes Year 1941	Federal Income Taxes Year 1942	California Income Taxes Year 1942
John E. Burrell, husband	\$166.00	\$9,122.54	\$1,055.58
Arley M. Burrell, wife	166.00	9,122.54	1,055.58

The value at the date of decedent's death of property subject to claims was \$17,160.48.

The decedent and his wife filed separate income tax returns with the Federal government and the State of California on their respective shares of joint and community income for the years 1941, 1942, and 1943. There were no statutory gifts between the decedent and his wife during decedent's lifetime.

All the valuations determined by the Commissioner in the estate are correct. The deductions, as determined by the Commissioner, apart from the issue of deductibility, are correct.

The estate tax return included among assets of the estate bank accounts held in joint tenancy by the decedent and his wife totaling approximately \$40,000. The separate income tax return of the decedent's wife for the year 1942 referred to the income reported as community income and reported a tax of \$18,245.06. Her return for the year 1943 showed a tax of \$119.36. After the death of the decedent she paid all claims against the estate, and paid a total of \$10,344.12 state and Federal income taxes for herself for 1941, 1942, and 1943, the amount being included in payments of \$4,561.26 on each of the [26] following dates: March 15, 1943; June 15, 1943, September 15, 1943, and December 15, 1943. The actual net worth of the decedent's estate and the amount determined by the Commissioner was \$134,135.60. Claims were filed against the estate in the total amount of \$29,395.73. Of that amount, the Commissioner, in determining the net estate, allowed \$17,160.48, disallowing \$1,891.13 of claims itemized as "Debts other than income taxes", and disallowing \$10,344.12, the amount of income taxes of the decedent's wife, Arley M. Burrell.

OPINION

The question presented here is purely one of law; the parties are not in dispute as to the facts. They

agree that the value at the date of decedent's death of property subject to claims was \$17,160.48. To that figure the Commissioner, under section 812(b) (5) of the Internal Revenue Code, limited the allowance of claims deducted. On reply brief, the petitioner agrees with the respondent that the unpaid income tax obligations of Arley M. Burrell are not proper deductions from the gross estate of the decedent. She further agrees that the \$1,891.13 of "Debts other than income taxes" above the \$17,160.48 was properly disallowed. The only contention made is summarized in the reply brief, that is, that the Court determine that the decedent's wife, the surviving tenant in joint tenancy, made a contribution to the jointly owned property of John E. Burrell and Arley M. Burrell in the sum of \$10,344.12, and that the gross estate of the decedent at the time of his death is \$123,791.48. In short, the petitioner contends that the estate of the decedent was \$10,344.12 less than determined by the Commissioner because of the fact that the wife, although a joint tenant with her husband in the entire estate, contributed [27] \$10,344.12 thereto because of having filed separate income tax returns for 1941, 1942, and 1943, and having paid that amount of taxes.

The Petitioner's argument, in sum, is that when the wife under the direction of her husband filed a separate income tax return reporting one-half of the community income, she incurred a personal liability in behalf of the community, and that a separate property interest was thereby created in her favor and carved out of the community estate; also,

that upon the conversion of the California community property, originally earned by the husband, into joint tenancy, she was a contributor to the joint tenancy under section 811(e)(1) of the Internal Revenue Code. She argues that a trust was impressed upon the joint estate in her favor and for a valuable consideration, by reason of her payment of the taxes.

We have examined this theory with interest but we find it tenuous rather than substantial. The husband died after October 22, 1942, and after the amendment of section 811 (e) of the Code to include in the decedent's gross estate the value of property held in joint tenancy—as it is agreed the gross estate here was held. The exception set forth in the statute requires that the surviving joint tenant must have originally owned the property claimed not to be included in the gross estate, and must never have received or acquired it from the decedent for less than an adequate and full consideration. We do not think that the petitioner has shown the situation here involved to be within the exception. The property had been community, earned by the husband. Did the wife, merely by filing separate income tax returns upon half of the joint income and paying the tax thereon, make a contribution in that amount to the joint estate? In our opinion the answer is in the negative. [28]

In the case of *Estate of Benjamin Franklin McGrew*, 46 B.T.A. 623, where the question was, as here, whether a certain amount was includible in a decedent's gross estate, we held that it was, in the

absence of a showing that it had been acquired from the decedent for an adequate and full consideration, holding that the fact that the wife had supplied the husband with funds with which to satisfy his creditors did not constitute consideration unless the advances were loans accompanied by a promise that they would be repaid. Quoting *Fox vs. Rothensies*, 115 Fed. (2d) 42, that "Expenditures out of the wife's separate estate made by the husband with her knowledge and consent will not render him liable to account for the same", we came to the conclusion that there was no evidence that the wife expected repayment or that decedent's funds, with which the joint account in question was opened, were given to the wife to liquidate any such promise or constituted an adequate and full consideration.

The petitioner's case here seems much weaker than in the cited case, for she simply relies upon separate income tax returns and payment of the tax. Obviously, there is, under the test in the *McGrew* case, nothing here to indicate a claim for adequate consideration against the decedent's estate. Although she states upon brief that the separate income tax returns were filed under the direction of her husband, no evidence whatever supports that statement.

The argument that there was a trust relationship between husband and wife is not, in our view, at all sufficient to establish the proper basis for a contribution to the estate within the intendment of section 811 (e) (1) of the Code. The statute sets a definite test for an exception to the rule that the in-

terest held as joint tenants by the decedent and another is includible in his gross estate, and we find nothing, either by way of trust relationship or legal consideration, to support separate ownership or contribution by the wife of [29] the funds here in question so that they should not be included in the joint estate and therefore within the gross estate of the decedent.

We conclude and hold that the gross estate was \$134,135.60. It having been agreed that \$17,160.48 was the value at the date of the decedent's death of property subject to the payment of claims, the Commissioner properly disallowed the remainder of the \$29,395.73 claims filed.

Decision will be entered for the respondent.

Entered April 6, 1948. [30]

The Tax Court of the United States
Washington

Docket No. 11886

ESTATE OF JOHN E. BURRELL, Deceased,
ARLEY M. BURRELL, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered April 6, 1948, it is

Ordered and Decided: That there is a deficiency in estate tax of \$2,199.80.

(Seal) /s/ R. L. DISNEY,
Judge.

Entered April 7, 1948. [31]

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

Petition of Estate of John E. Burrell, deceased, Arley M. Burrell, Executrix, for Review by the United States Circuit Court of Appeals for the Ninth Circuit of a Decision by The Tax Court of the United States.

The Estate of John E. Burrell, deceased, Arley M. Burrell, executrix, the petitioner in this cause,

by F. T. Ritter, counsel, hereby files its petition for a review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision by The Tax Court of the United States rendered on April 7, 1948, P. 48,051 P-H Memo TC, determining a deficiency in the petitioner's Federal estate tax in the amount of \$2,199.80. [32]

I.

The petitioner is the Estate of John E. Burrell, deceased, who died July 28, 1943. Arley M. Burrell, widow of decedent, residing in Long Beach, California, is the duly appointed executrix. The return for the estate here involved was filed with the Collector for the 6th District of California.

II.

Nature of the Controversy

The controversy involves the proper determination of the petitioner's liability for federal estate taxes.

The decedent during his thirty years of residence in California had been in the contracting business. As earnings were made in the business and were available for withdrawal, they were withdrawn by him and converted into joint tenancy property of John E. Burrell and Arley M. Burrell (husband and wife). The conversion took place immediately upon withdrawal and prior to the payment of income taxes thereon.

The nature of the income of the contracting business during his lifetime was community income.

It was decedent's practice to file separate income tax [33] returns for himself and his wife, each

reporting one-half of the community income on the respective returns. Arley M. Burrell, wife of decedent, was, as a result of this practice, at the time of decedent's death still obligated to pay federal and state income taxes in the sum of \$10,344.12 for the years 1941 and 1942 and did later pay this amount on income originally community in character between decedent and herself but which decedent had converted to joint tenancy property prior to the settlement of income taxes thereon.

Petitioner contends that the joint tenancy estate of John E. Burrell and Arley M. Burrell at the time of decedent's death included funds as a result of the conversion in the aforesaid manner of which \$10,344.12 had been contributed by Arley M. Burrell, by her assumption of the taxes and later payment thereof and should therefore be excluded from decedent's gross estate as the contribution of the surviving tenant.

The Commissioner of Internal Revenue held that Arley M. Burrell, surviving tenant, made no contribution to the jointly-owned property of John E. Burrell and Arley M. Burrell.

III.

The Estate of John E. Burrell, deceased, Arley M. [34] Burrell, executrix, being aggrieved by the findings of fact and conclusions of law contained in the said findings and opinion of the Court, and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit.

IV.

Assignments of Error

The petitioner assigns as error the following acts and omissions of The Tax Court of the United States:

1. The holding that the question presented to the Court was solely “—whether the Commissioner erred in disallowing a deduction of \$10,344.12 from the decedent’s gross estate.”

2. The failure to determine that Arley M. Burrell had made a contribution in the sum of \$10,344.12 to the jointly-owned property of John E. Burrell and Arley M. Burrell.

3. The failure to find that the extent of the interest of the decedent in the jointly-owned property subject to estate taxes was \$99,803.75, being the total of the jointly-owned property in the amount of \$110,147.87 less the contribution of \$10,344.12 by Arley M. Burrell. [35]

4. The failure to find that the gross estate of the decedent subject to estate taxes amounted to \$123,791.48.

5. The holding that the “actual net worth of the decedent’s estate—was \$134,135.60.”

6. The failure to find there was under California statutes relative to community property and contractual relations of a husband and wife residing in California at least a presumption the wife acts under the husband’s direction when she signs and files a separate income tax return reporting one-half of the community income of her husband.

7. The finding of a deficiency in the estate tax

of decedent's estate in the amount of \$2,199.80, in lieu of a determination that the estate owes no additional estate taxes.

/s/ F. T. RITTER,
Attorney,
Counsel for Petitioner.

(Duly Verified.)

[Endorsed]: Filed July 6, 1948. [36]

In the United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 11886

ESTATE OF JOHN E. BURRELL, Deceased,
ARLEY M. BURRELL, Executrix,
Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

NOTICE OF FILING PETITION FOR
REVIEW

To Charles Oliphant, Chief Counsel, Bureau of Internal Revenue.

You are hereby notified that the above petitioner did, on the 6th day of July, 1948, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of this Court heretofore ren-

dered in the above-entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 8th day of July, 1948.

/s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States.

Service of copy of Petition for Review acknowledged this July 8, 1948.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue,
Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed July 8, 1948. [38]

The Tax Court of the United States
Docket No. 11886

ESTATE OF JOHN E. BURRELL, Deceased,
ARLEY M. BURRELL, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PRAECIPE FOR RECORD

To the Clerk of the Tax Court of the United States:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Cir-

cuit Court of Appeals for the Ninth Circuit, with reference to petition for review hertofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

1. The docket entries of all proceedings before the Tax Court.
2. Pleadings before the Tax Court of the United States, as follows:
 - (a) Petition for redetermination.
 - (b) Answer of the respondent.
3. The findings of fact and opinion of the Tax Court of the United States.
4. The decision of the Court.
5. The petition for review, filed by the petitioner in the above cause.
6. This Praeceptum.

/s/ F. T. RITTER,

Attorney for Petitioner.

Personal service of the foregoing Praeceptum for Record is hereby acknowledged this 21st day of July, 1948. No counter-praeceptum will be filed.

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of

Internal Revenue,

Counsel for Respondent.

[Endorsed]: Filed July 22, 1948. [39]

In the United States Court of Appeals
for the Ninth Circuit

No. 12011

ESTATE OF JOHN E. BURRELL, Deceased,
ARLEY M. BURRELL, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS ON WHICH PETI-
TIONER INTENDS TO RELY ON APPEAL

Petitioner hereby adopts as his points on appeal
the assignments of error included in the petition
for review within the transcript of record.

/s/ F. T. RITTER,
Counsel for Petitioner.

(Acknowledgment of Service attached.)

[Endorsed]: Filed August 23, 1948. Paul P.
O'Brien, Clerk.